CNN America, Inc. and Team Video Services, LLC, Joint Employers and National Association of Broadcast Employees & Technicians, Communication Workers of America, Local 31, AFL—CIO and National Association of Broadcast Employees & Technicians, Communication Workers of America, Local 11, AFL—CIO. Cases 5—CA—31828 and 5—CA—33125 (formerly 2—CA—36129)

May 9, 2008

ORDER GRANTING IN PART THE GENERAL COUNSEL'S MOTION TO BIFURCATE AND SUSTAINING THE JUDGE'S RULING ON PRODUCTION OF DOCUMENTS FOR IN CAMERA INSPECTION¹

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On April 17, 2008, the General Counsel filed with the Board a motion to bifurcate consideration of certain issues presented in Respondent CNN America, Inc.'s (the Respondent or CNN) request for special permission to appeal the denial of its petitions to revoke subpoenas (Special Appeal), which is currently pending before the Board. The General Counsel's motion requests that the Board sustain Administrative Law Judge Arthur Amchan's rulings that (1) the Respondent must produce the documents listed on the Respondent's second revised privilege and redaction logs for in camera review by the administrative law judge, and (2) the General Counsel's Subpoena Duces Tecum be enforced regarding the production of the Respondent's payroll records. On April 28, 2008, CNN filed an opposition brief and request to strike the General Counsel's motion.

After careful consideration, we grant the General Counsel's motion to bifurcate consideration of the issue concerning the judge's in camera inspection of the documents listed on the Respondent's privilege and redaction logs, and we order the Respondent to produce those documents to the judge for in camera inspection. However, we deny the General Counsel's motion to bifurcate consideration of the issue concerning the Respondent's payroll records requested in the subpoena. We also deny CNN's request to strike the General Counsel's motion.

I. IN CAMERA INSPECTION OF DOCUMENTS

Background

On December 3, 2007, the judge denied the Respondent's motion to revoke the subpoena, ruling that the subpoena is enforceable except to the extent that he specifically rules otherwise or defers making a decision on particular issues. Thereafter, the Respondent filed a request for special permission to appeal this ruling to the Board, which is currently pending before the Board.

In its Special Appeal, the Respondent argues, inter alia, that many of the subpoenaed documents are generally protected from disclosure by the attorney-client and attorney work-product privileges. Despite the pendency of the Appeal, the judge has permitted the Respondent to assert, during the ongoing hearing, that specific documents are protected by the attorney-client and/or attorney work-product privileges. On February 29, 2008, CNN produced to the General Counsel and the judge its "Second Revised Privilege and Redaction Logs" describing documents that it is withholding or redacting based on the assertion of attorney-client and/or work-product privileges.

On March 10, 2008, the judge ordered CNN to produce to him, in unredacted form for in camera inspection, all documents dated between January 1, 2003, and February 29, 2004, listed on the privilege and redaction logs ("March 10 ruling"). CNN refused to comply, arguing on the record that the judge was the trier of fact and therefore should not review the allegedly privileged documents. CNN also argued on the record that a Federal district court, not an administrative law judge, must determine privilege issues, citing *NLRB v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999).

Discussion

We find that the Respondent has not demonstrated in its Special Appeal how any of the subpoenaed documents are protected from disclosure by the attorney-client privilege. The party asserting a privilege bears the burden of

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

² CNN has not requested special permission from the Board to appeal the judge's March 10 ruling.

³ In response to CNN's argument, the General Counsel proposed as an alternative that another administrative law judge review in camera the documents listed on the privilege logs. CNN rejected this proposal. CNN's agreement to this proposal would constitute compliance with this Order

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proving that it is applicable.⁴ Moreover, the fact that a document may be contained in the files of a company's in-house counsel does not establish privilege. "It is *communication* between attorney and client related to the giving of legal advice that is privileged—not simply documents that pass between them. Thus, nonprivileged documents—e.g., *ordinary corporate records such as payroll or personnel records*—cannot be swept within the privilege simply by being transmitted from client to attorney or vice versa." CNN's argument that one subpoena paragraph seeks information sent or received by individuals including CNN in-house counsel is insufficient to meet its burden.

However, the judge has continued to consider the Respondent's claims that certain documents are privileged. and has offered the Respondent the opportunity to present certain documents for in camera inspection. Thus, the issue before us here is whether the judge appropriately exercised his discretion in ordering an in camera inspection of the documents on CNN's privilege and redaction logs. We find that he has. In camera inspections are well-established procedures in the Federal courts, U.S. v. Smith, 123 F.3d 140, 151-152 (3d Cir. 1997), and have been approved by the Board, Brink's Inc., 281 NLRB 468 (1986).6 Without an in camera inspection of allegedly privileged documents, the party claiming privilege would be able to shield any document from disclosure by merely including it in a privilege log. In addition, some courts appear to require the exhaustion of administrative remedies before granting enforcement of a subpoena.⁷ Thus, we find that the in camera examination of documents to evaluate claims of privilege is a proper exercise of the administrative law judge's authority.

II. PAYROLL RECORDS

Background

The General Counsel also requests bifurcation and expedited consideration of the judge's denial of the Respondent's petition to revoke the subpoena with regard to

CNN's payroll records. The General Counsel argues that the requested payroll records are necessary to analyze the complex allegations regarding successor or joint employer status, unlawful withdrawal of recognition, unlawful unilateral changes, unlawfully motivated cancellation of news-gathering agreements with TVS, and discrimination based on union activity and membership.

CNN did not specifically address the subpoena's request for payroll records in its pending Special Appeal, other than through its general arguments that most of the subpoena should be revoked. However, it is apparent from a review of the transcript pages cited by the General Counsel (and attached to his April 17 memo), that the General Counsel has sought CNN's payroll records in electronic form since the beginning of the investigation in this case, and CNN has continued to assert that its payroll records do not exist in an electronic form that can be produced without undue burden and expense, if at all.

Discussion

Although we agree with the General Counsel that the payroll records are relevant to the allegations in the complaint, the record reveals that the parties are continuing to debate before the judge whether payroll records exist in the electronic format requested by the subpoena, and that the judge does not appear to have made a definitive ruling with respect to the production of these records. Thus, the specific issue regarding payroll records is not ripe for the Board's review at this stage in the proceeding.

Moreover, the parties' arguments on the record indicate that the primary dispute over the payroll records is not their relevance, but rather the General Counsel's request for the records in electronic form. As noted above, CNN contends that the payroll records do not exist as a separate program that can be readily produced, but rather are imbedded throughout CNN's computer system. Thus, these contentions relate to the broader issue of the burdensomeness of producing certain types of electronic information that have been raised by the Respondent in its Special Appeal. For these reasons, we deny the General Counsel's motion to bifurcate consideration of the payroll records issue at this time.

ORDER

It is ordered that the General Counsel's motion to bifurcate consideration of issues regarding the Respondent's assertion that certain of its documents are protected from disclosure by the attorney-client privilege is granted, and the Respondent's request to strike the General Counsel's motion is denied. It is further ordered that the Respondent's request for permission to file a special

⁴ See, e.g., *Dole v. Milonas*, 889 F.2d 885, 889 (9th Cir. 1989).

⁵ Patrick Cudahy, Inc., 288 NLRB 968, 971 fn. 13 (1988) (emphasis added)

⁶ See also *Kaiser Aluminum & Chemical Corp.*, 339 NLRB 829, 829 (2003) (to the extent that subpoenaed documents were claimed as privileged attorney work product, the Board authorized the judge "to review those documents in camera to determine whether they are also exempt from disclosure"). Therefore, contrary to the Respondent's argument, we do not view the Sixth Circuit's holding in *Detroit Newspapers*, supra, as supporting the general proposition that an administrative law judge, as the trier of fact, cannot resolve privilege issues.

⁷ See, e.g., *Maurice v. NLRB*, 691 F.2d 182, 183 (4th Cir. 1982); *NLRB v. Duval Jewelry Co. of Miami*, 243 F.2d 427, 430 (5th Cir. 1957), reversed on other grounds 357 U.S. 1 (1958).

appeal of the administrative law judge's denial of its petition to revoke the General Counsel's subpoena concerning those documents is granted, and that the Respondent's special appeal of the judge's ruling is denied. It is

further ordered that this proceeding is remanded to Administrative Law Judge Arthur Amchan for further action consistent with this decision.